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SOUTHERN DISTRICT OF CALIFORNIA
BY: *JP*
DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITE HERE International Union,

Petitioner,

vs.

PALA BAND OF MISSION
INDIANS,

Respondent.

CASE NO. 07-CV-2312 W (AJB)

**ORDER GRANTING
RESPONDENT'S MOTION TO
DISMISS FOR LACK OF
SUBJECT MATTER
JURISDICTION (Doc. No. 4)**

On December 11, 2007 Petitioner Unite Here ("Petitioner" or "Unite Here") filed this petition to confirm an arbitration award against Respondent Pala Band of Mission Indians ("Respondent" or "Pala Band"). (Doc. No. 1.) On April 4, 2008 Respondent moved to dismiss the petition for lack of subject matter jurisdiction. (Doc. No. 4.) The Court decides the matter on the papers submitted and without oral argument. See S.D. Cal. Civ. R. 7.1(d)(1). For the following reasons, the Court **GRANTS** Respondent's motion and **DISMISSES** Petitioner's petition. (Doc. No. 4.)

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1 **I. BACKGROUND**2 **A. The Parties**

3 Petitioner Unite Here is an international labor union with an office in San Diego
4 County. (Pet. ¶ 4.) Respondent Pala Band of Mission Indians is an Indian tribe whose
5 reservation is located in San Diego County. (Id. ¶ 5.) The Pala Band owns and
6 operates a casino known as the Pala Casino Spa and Resort (“Casino”), which is also
7 located in San Diego County. (Id.) Many Casino workers belong to the Unite Here
8 labor union.

9

10 **B. A Brief Legal Backdrop of Indian Gaming, The Pala Band, and Labor**
11 **Dispute Resolution**

12 In 1988, Congress enacted the Indian Gaming Regulatory Act (“IGRA”). 25
13 U.S.C. §§ 2701 *et. seq.* The IGRA provides a statutory basis for the operation of tribal
14 gaming as a means of promoting tribal economic development, self-sufficiency, and
15 strong tribal government. 25 U.S.C. §§ 2701(1), (2). The Act is an example of
16 “cooperative federalism,” in that it seeks to balance the competing sovereign interests
17 of the federal government, state governments, and Indian tribes by giving each a role
18 in the regulatory scheme. Artichoke Joe’s v. Norton, 216 F. Supp. 2d 1084, 1092
19 (E.D.Cal. 2002).

20 IGRA created three tribal gaming classes, each subject to a different level of
21 regulation. In re Indian Gaming Related Cases, 331 F.3d 1094, 1096–97 (9th Cir.
22 2003). Class III gaming, or the type of high-stakes gaming usually associated with
23 Nevada-style gambling, is subject to a greater degree of federal and state regulation than
24 either class I or class II gaming (*e.g.* bingo, etc.). Id. at 1097. Under the IGRA, in
25 order for a tribe (like the Pala Band) to conduct class III gaming, the gaming must be
26 conducted in conformance with a Tribal-State Gaming Compact entered into by the
27 Indian tribe and the State and approved by the Secretary of the Interior. 25 U.S.C.
28 § 2710(d).

1 In 1999, the Pala Band, wanting to conduct class III gaming on tribal land,
 2 entered into a Tribal-State Gaming Compact (the “Gaming Compact”) with the state
 3 of California, which was ultimately approved by the Secretary of the Interior. (Pet. ¶
 4 6, 8.) The State, however, agreed to the Compact on the condition that the Pala Band
 5 tolerate some measure of labor relations for Casino employees. (Pet. Ex. A, § 10.7
 6 [hereinafter “Gaming Compact”].) Specifically, Section 10.7 of the Gaming Compact
 7 required the Pala Band to:

8 [P]rovide[] an agreement or other procedure acceptable to the [state of
 9 California] for addressing organizational and representational rights of
 10 Class III Gaming Employees and other employees associated with the
 11 Tribe’s Class III gaming enterprise, such as food and beverage,
 12 housekeeping, cleaning, bell and door services, and laundry employees at
 13 the [Casino], the only significant purpose of which is facilitate patronage
 14 at the [Casino].

15 (Gaming Compact, § 10.7.)

16 On September 22, 1999, in order to satisfy Gaming Compact Section 10.7, the
 17 Pala Band adopted the Model Tribal Labor Relations Ordinance (“TLRO”). (Pet. ¶ 7.)
 18 Among other things, the TLRO defined unfair labor practices, guaranteed eligible
 19 Casino employees the right to collectively bargain, and outlined a three-level binding
 20 dispute resolution procedure, which included arbitration. (See generally Pet. Ex. A at
 21 10–18 [hereinafter “TLRO”].)¹

22 Under the TLRO, when a labor dispute arises the aggrieved party must first
 23 present his grievance to a designated tribal forum. (TLRO § 13(b).) The second level
 24 of dispute resolution involves the Tribal Labor Panel, comprised of ten arbitrators
 25 mutually appointed by the parties. (TLRO § 13(c).) Depending on whether a party

26 ¹The TLRO adopted by the Pala Band appears to be a straightforward ordinance
 27 modeled after labor ordinances enacted by many other gaming tribes. Courts have found that
 28 these ordinances are validly enacted to satisfy Gaming Compacts, and find that “[t]he TLRO
 provides only modest organizing rights to tribal gaming employees and contains several
 provisions protective of tribal sovereignty.” See In re: Indian Gaming Related Cases, 331 F.3d
 1094, 1116–1117 (9th Cir. 2003) (discussing and approving of near-identical TLRO under
 near-identical Gaming Compact).

1 objects, either one or three arbitrators hear the grievance and render a binding, written
 2 decision. (TLRO § 13(c).)

3 Under the third level of binding dispute resolution:

4 [E]ither party may seek a motion to compel arbitration or a motion to
 5 confirm an arbitration award in Tribal Court, which may be appealed to
 6 federal court. If the Tribal Court does not render its decision within 90
 7 days, or in the event there is no Tribal Court, the matter may proceed
 8 directly to federal court. In the event the federal court declines
 9 jurisdiction, the [Pala Band] agrees to a limited waiver of its sovereign
 immunity for the sole purpose of compelling arbitration or confirming an
 arbitration award issued pursuant to the [TLRO] in the appropriate state
 superior court.

10 (TLRO § 13(d).)

12 **C. The Parties' Dispute and the Arbitration Award**

13 In February and March 2006, the Pala Band received reports that Hilario Cubias
 14 ("Cubias"), a Casino employee and Unite Here union member, was interfering with
 15 other employees' work by trying to get them more involved with labor union activities.
 16 (Pet. Ex. D. at 23 [hereinafter "Arbitration Opinion"].) A Casino supervisor told Cubias
 17 that he could not discuss union issues on work time, though other types of non-work-
 18 related speech were tolerated. (*Id.* at 25.) Unite Here objected to the double standard.

19 On March 16, 2007 Unite Here and Pala Band invoked the TLRO's second level
 20 of dispute resolution and held a hearing before Arbitrator Sara Adler ("Adler"). (Pet.
 21 ¶ 12.) On August 30, 2007 Adler issued a binding decision ("Decision"), finding that
 22 the Pala Band committed an unfair labor practice by violating a TLRO clause
 23 protecting the right to unionise.² (Arbitration Opinion 27.) Adler's Decision also held
 24 that "[the Pala Band] is ordered to cease and desist from enforcing any rule regarding

26 ²Section 4 of the TLRO states that:
 27 Eligible Employees shall have the right to self-organization, to form, to join, or
 28 assist employee organizations, to bargain collectively through representatives of
 their own choosing, to engage in other concerted activities for the purpose of
 collective bargaining or other mutual aid or protection, and shall have the right
 to refrain from any or all such activities.

1 speech about [Unite Here] different from one enforced about any other non-work-
 2 related speech." (*Arbitration Opinion* 27.)

3 In June 2007, Unite Here and Pala Band arbitrated an unrelated dispute
 4 concerning recently-suspended Casino employee Catalino Morales ("Morales"). (Pet.
 5 ¶ 16.) On September 20, 2007 Arbitrator Franklin Silver issued an award favorable to
 6 Unite Here that ordered Morales be returned to work with full back pay. (*Id.*)

7 On October 18, 2007, the day Morales was scheduled to return to work, Casino
 8 employees distributed leaflets celebrating Unite Here's victory and Morales' impending
 9 return. (Pet. ¶ 17; Ex. E.) The leaflets also invited Casino workers to consult with
 10 Unite Here if they felt pressured or unfairly disciplined at work. (*Id.*) The same day,
 11 Casino employees planned to distribute slices of cake containing similar messages. (Pet.
 12 ¶ 18.)

13 Unfortunately, Pala Band agents allegedly stopped and prohibited Casino
 14 employees from distributing the leaflets and cake because they contained pro-union
 15 messages. (*Id.* ¶¶ 17, 18.) Because the Pala Band does not prohibit Casino employees
 16 from distributing leaflets or cake that do not contain pro-union messages, Unite Here
 17 believes that the events of October 18, 2008 violated Adler's August 30, 2007
 18 arbitration Decision. (*Id.* ¶ 19.)

19 On December 11, 2007 Petitioner Unite Here invoked the TLRO's third level
 20 of binding dispute resolution by filing a petition in this Court to confirm Arbitrator
 21 Adler's December 30, 2007 Arbitration Decision against Respondent Pala Band of
 22 Mission Indians. (Doc. No. 1.) On April 4, 2008 Pala Band moved to dismiss the
 23 Petition for lack of subject matter jurisdiction. (Doc. No. 4.) On May 5, 2008 Unite
 24 Here opposed Pala Band's motion. (Doc. No. 8.) On May 12, 2008 Pala Band filed its
 25 Reply brief. (Doc. No. 9.)

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1 **II. LEGAL STANDARD**

2 Rule 12(b)(1) provides that a court may dismiss a claim for “lack of jurisdiction
 3 over the subject matter[.]” Fed. R. Civ. P. 12(b)(1). Although the defendant is the
 4 moving party in a motion to dismiss, the plaintiff is the party invoking the court’s
 5 jurisdiction. Therefore, the plaintiff bears the burden of proof on the necessary
 6 jurisdictional facts. McCauley v. Ford Motor Co., 264 F.3d 952, 957 (9th Cir. 2001).

7 “Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the
 8 substance of a complaint’s jurisdictional allegations despite their formal sufficiency, and
 9 in so doing rely on affidavits or any other evidence properly before the court.” St. Clair
 10 v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989) (citing Thornhill Publishing Co. v.
 11 General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979)); see also Marriot
 12 Intern., Inc. v. Mitsui Trust & Banking Co., Ltd., 13 F. Supp. 2d 1059, 1061 (9th. Cir.
 13 1998).

14 Jurisdiction cannot be waived, and the court is under a continuing duty to dismiss
 15 an action whenever it appears the court lacks jurisdiction. Fed. R. Civ. P. 12(b)(1);see
 16 also Snell v. Cleveland, 316 F.3d 822, 826 (9th Cir. 2002). In ruling on a challenge to
 17 subject matter jurisdiction, the district court is ordinarily free to hear evidence
 18 regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes
 19 where necessary. See Thornhill, 594 F.2d at 733. In such circumstances, “[n]o
 20 presumptive truthfulness attaches to plaintiff’s allegations, and the existence of disputed
 21 material facts will not preclude the trial court from evaluating for itself the merits of
 22 jurisdictional claims.” Id.

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1 **III. DISCUSSION**2 **A. The Court Lacks Subject Matter Jurisdiction Because Confirming**
3 **the Arbitration Award Does Not Require Resolution of a Substantial**
4 **Question of Federal Law**5 Respondent argues that subject matter jurisdiction does not exist because
6 confirming the arbitration award does not require resolving a substantial question of
7 federal law. (Resp.'s Mot. 6–9.) Even if the IGRA provided some sort of jurisdictional
8 basis, Respondent contends, no private right of action exists allowing Unite Here to
9 bring suit, and in any event the Pala Band has not waived its sovereign immunity from
10 suit in this forum. (*Id.* 9–13.)11 Petitioner, in response, frames its petition as an action to enforce a breach of the
12 Gaming Compact, and argues that jurisdiction exists under Cabazon Band of Mission
13 Indians v. Wilson, 124 F.3d 1050 (9th Cir. 1997). (Pet.'s Opp'n 6–8.) Petitioner
14 contends that a private right of action must exist to enforce the Gaming Compact,
15 otherwise the Cabazon plaintiffs would not have had a cause of action. (*Id.* 9–11.)16
17 **i. Under Cabazon, Federal Question Jurisdiction Exists For**
18 **Signatories To Enforce Tribal-State Gaming Compacts**19 The Petition anchors federal jurisdiction on 28 U.S.C. § 1331 and Cabazon, 124
20 F.3d at 1056. (Pet. ¶ 2.) Section 1331 grants district courts jurisdiction over “all civil
21 actions arising under the Constitution, laws, or treaties of the United States.” 28
22 U.S.C. § 1331. For a case to “arise under” federal law, a plaintiff’s complaint must
23 establish “either that federal law creates the cause of action or that Plaintiff’s right to
24 relief necessarily depends on resolution of a substantial question of federal law.”
25 Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal., 463 U.S. 1,
26 27–28 (1983). The fact that a defendant is a tribal sovereign is not, by itself, sufficient
27 to raise a federal question. Gila River Indian Cmtv. v. Henningson, Durham &
28 Richardson, 626 F.2d 708, 714 (9th Cir. 1980).

1 Federal question jurisdiction exists for signatories to enforce Gaming Compacts
2 under the IGRA. Cabazon, 124 F.3d at 1050. In Cabazon, plaintiff Indian tribes
3 compacted with defendant State of California to offer off-track horse race wagering on
4 tribal land. Id. at 1053. When the parties signed the gaming compacts, it was unsettled
5 whether federal law required California to pay over to the tribes license fees collected
6 from racing associations for bets made on tribal land. Id. Per the compact's terms, the
7 State and tribe agreed to submit to a federal district court whether the fees were
8 permissible under the IGRA. Id.

9 The compact itself contained a contingency, depending on what the district court
10 held. Id. at 1054. If the license fees were permissible, California would retain and
11 collect all fees, including those collected on tribal land. Id. If, however, the fees were
12 impermissible, the tribe was entitled to all fees previously collected as well as future
13 credits. Id.

14 Ultimately, the Ninth Circuit found the fees impermissible because the IGRA
15 preempted California from taxing off-track betting on tribal land. Id. (citing Cabazon
16 Band of Mission Indians v. Wilson, 37 F.3d 430, 435 (9th Cir. 1994) ("Cabazon II")).
17 Despite the ruling, California refused to pay over the fees and declared the gaming
18 compacts invalid. Cabazon, 124 F.3d at 1054.

19 The tribes then sued the State of California to enforce the gaming compact's
20 contingency and collect past and future fees. Id. California moved to dismiss, arguing
21 that the gaming compacts were purely contractual in nature and beyond federal
22 question jurisdiction. Id. at 1055. The Ninth Circuit disagreed. Id. at 1055–56.
23 Cabazon held that although federal courts did not have jurisdiction over "run-of-the-
24 mill" contract claims, the tribes' claim was not based on a contract that stood
25 independent of the gaming compact. Id. Because the contingency agreement was
26 actually contained within the gaming compact, and the gaming compacts were "quite
27 literally" a creation of federal law, federal jurisdiction existed in order for the tribes to
28 enforce the gaming compact's terms. Id. at 1056. The presence of a neutral federal

1 forum to resolve the dispute was important: "Congress... did not create a mechanism
 2 whereby states can make empty promises to Indian tribes during good faith [compact
 3 negotiations], knowing that they may repudiate them with immunity whenever it serves
 4 their purpose." Cabazon, 124 F.3d at 1056.

5

6 ii. ***Under Peabody Coal, Enforcing an Arbitration Award Does Not***
 7 ***Raise a Substantial Question of Federal Law***

8 In cases where a tribal sovereign has not tried to assert authority over a non-
 9 tribal party, and where the validity of a federally regulated contract is not at issue,
 10 courts have not found a substantial federal question to be present. See Peabody Coal
 11 Co. v. Navajo Nation, 373 F.3d 945, 951 (9th Cir. 2004) (collecting cases). In Peabody
 12 Coal, plaintiff coal company and defendant Indian tribe litigated against the backdrop
 13 of the Indian Mineral Leasing Act ("IMLA"), 25 U.S.C. §§ 396a et. seq., which required
 14 the Secretary of the Interior ("Secretary") to approve all mineral leases between
 15 commercial companies and Indian tribes. Peabody Coal, 373 F.3d at 946. The original
 16 lease between the coal company and tribe authorized the Secretary to readjust royalty
 17 rates at specific time intervals. Id. The parties eventually agreed to amend the original
 18 lease, and the provision allowing the Secretary to readjust rates was replaced by an
 19 arbitration clause as the "sole and exclusive method" for adjusting royalties. Id. at 947.³
 20 The Secretary of the Interior approved the amended lease. Id.

21 Some years later, the coal company and the tribe reached an impasse in
 22 negotiating royalty rates and convened an arbitration panel. Id. Although the parties
 23 eventually negotiated a settlement, the settlement's terms were memorialized in a "final

24
 25 ³Like the instant case, the tribe in Peabody Coal also agreed to waive its sovereign
 26 immunity from actions to enforce or appeal any resulting arbitration decision, and consented
 27 to suit in the United States District Court for the District of Arizona for the limited purpose
 28 of enforcing or appealing the arbitration decision. Peabody Coal, 373 F.3d at 947. Of course,
 merely because the litigants consent to suit in federal court does not provide an independent
 basis of federal subject matter jurisdiction. See, e.g., Morongo Band of Indians v. California
State Bd. of Equalization, 858 F.2d 1376, 1380 (9th Cir. 1988) ("The parties have no power
 to confer jurisdiction on the district court by agreement or consent.")

1 arbitration award." Id. In addition, the parties again amended the mineral lease in
 2 conjunction with the award, which was duly approved by the Secretary. Peabody Coal,
 3 373 F.3d at 947.

4 For various reasons, disagreements arose and the coal company filed suit in
 5 federal court seeking to enforce the final arbitration award. Id. at 949. Although the
 6 coal company did not seek to enforce the underlying leases or amendments, the
 7 company premised federal jurisdiction on the Secretary's prior lease approval and the
 8 "general federal regulatory scheme governing mineral leases." Id.

9 The Peabody Coal court found it lacked federal subject matter jurisdiction to
 10 enforce the parties' arbitration agreement because the coal company's complaint did
 11 not allege that the tribe was currently in breach of any lease provision or amendment.
 12 Id. at 950. Despite the presence of a federally-approved lease, the coal company sought
 13 to enforce an arbitration award that was not federally approved. See id. (noting that the
 14 parties agreed that no action of the Secretary was necessary to effectuate the arbitration
 15 award). The court found that the only contract at issue was the arbitration award,
 16 which was not a specialized type of contract subject to extensive federal regulation. Id.
 17 at 951.⁴ Rather:

18 Whether the [tribe] is somehow in breach of this award is an issue that
 19 can be resolved by the common law of contracts. Federal approval of the
 20 underlying leases or amendments has no material bearing on whether this
 21 award requires confirmation or enforcement. Therefore, [the coal
 company's] complaint does not present a federal question.

22 Id. at 951–52.

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 27 ⁴Additionally, the Peabody Coal court did not decide the question of whether the
 28 existence of a federal question in an arbitrated dispute would confer federal subject matter
 jurisdiction to confirm or enforce the resulting arbitration award pursuant to 9 U.S.C. § 9. See
Peabody Coal, 373 F.3d at 952 n.5. That issue is not implicated in this case because Unite
 Here's arbitration award is premised on violations of the TLRO, and not on federal law.

iii. **Like Peabody Coal, Confirming the Arbitration Award Does Not Present a Federal Question**

3 As a threshold issue, Unite Here is not bringing a cause of action created by the
4 IGRA or other federal law. See Gen. Atomic Co. v. United Nuclear Corp., 655 F.2d
5 968, 969 (9th Cir. 1981) (holding that 9 U.S.C. § 9 does not create federal question
6 jurisdiction in an action to confirm an arbitration award). Rather, Unite Here—a
7 private party—merely wants to enforce an arbitration award in federal court: there is
8 no State-Tribal dispute concerning any provision of the IGRA or the Gaming Compact.
9 Thus, this case is less like Cabazon’s compact dispute and more like Peabody Coal’s
10 arbitration enforcement. And although Peabody Coal distanced itself from gaming
11 compact case law, Unite Here has not argued *why* Peabody Coal’s four-square principles
12 should not apply. See Peabody Coal, 373 F.3d at 950 n. 3 (finding persuasive authority
13 involving gaming compact irrelevant because it did not involve validity of a coal lease).

14 Unite Here is undoubtedly correct when it argues that the gaming compacts are
15 a product of federal law, and that the TLRO was a valid subject of Compact
16 negotiations. (Pet.’s Opp’n 4–6.) Unlike the Cabazon dispute, however, private
17 enforcement of a TLRO arbitration award is farther removed from applying federal law
18 to a State-Tribal dispute involving an explicit IGRA provision or Gaming Compact
19 contingency. Because neither the IGRA nor Cabazon expressly confer federal
20 jurisdiction for this type of action, the Court is mindful of “[becoming] the arbiter of
21 any and all disputes that may arise out of [gaming compacts].” Cabazon, 124 F.3d at
22 1064 (Wiggins, J., dissenting). In short, the Court does not consider a TLRO or
23 arbitration award violation on par with a Cabazon gaming compact claim.

24 Unite Here does not allege that Pala Band is violating any specific IGRA or
25 Gaming Compact provision;⁵ whether the Pala Band is somehow in breach of Adler's

⁵That is, Unite Here does not argue that the Pala Band is violating the IGRA or shirking its responsibilities under the Gaming Compact. The Court finds that the TLRO is incorporated by reference in the Gaming Compact only in the most technical sense, and for the above reasons Cabazon's principles cannot be applied to shoehorn a petition to confirm a

1 arbitration award is an issue that can be resolved by the common law of contracts. See
 2 Peabody Coal, 373 F.3d at 951–52. Whereas Cabazon’s obligation between the state
 3 and the tribe originated in the gaming compact, Cabazon, 124 F.3d at 1056, the only
 4 obligation *specifically* at issue here originates much further downstream in Adler’s
 5 arbitration award. Like Peabody Coal, despite the presence of overarching federal
 6 regulation, neither the TLRO nor the arbitration award required federal approval.
 7 See also Littell v. Nakai, 244 F.2d 486 (9th Cir. 1965) (holding that “there is no federal
 8 question where the main dispute is centered on a contract and its construction, rather
 9 than the validity of the federal approval of the contract.”).

10 Additionally, Unite Here’s reliance on Cabazon makes more sense in the context
 11 of State-Tribal gaming compact disputes, where a federal court is necessary to provide
 12 a neutral forum that otherwise might not exist.⁶ See Cabazon, 124 F.3d at 1056
 13 (finding that IGRA necessarily conferred federal jurisdiction to enforce Gaming
 14 Compacts so states could not avoid promises by asserting sovereign immunity). Where,
 15 as here, a private party brings suit, neither litigant is significantly disadvantaged by
 16 proceeding in a state or tribal forum.

17 In conclusion, despite Unite Here’s insistence to the contrary, this action is not
 18 a Cabazon claim to enforce a specific provision in a Gaming Compact: rather, the
 19 parties and dispute are even further removed from the IGRA and Unite Here never
 20 points to a substantial question of federal law on which this suit turns. If anything, the
 21 core issue is non-federal—it involves Casino employee labor rights, bargained for by the
 22 state of California, and guaranteed by a tribal labor ordinance. The only contracts at
 23 issue in Unite Here’s claim are the TLRO and arbitration award, which are not
 24
 25

26 TLRO arbitration award into federal court.

27
 28 ⁶Indeed, Unite Here’s arguments about the necessity of a neutral federal court spill over
 into its discussion of whether a private right of action exists to enforce the gaming compact.
 (Pet.’s Opp’n 10–11.) Many of these arguments are premised in the context of a State-Tribal
 dispute, not a private party-tribal dispute.

1 specialized types of contracts subject to extensive federal regulation.⁷ See Peabody
 2 Coal, 373 F.3d 945 (using identical reasoning in dismissing case for lack of subject
 3 matter jurisdiction). Because federal courts must “jealously protect our limited
 4 resources by ensuring that we adjudicate only those matters that we are authorized to
 5 hear by Congress and the Constitution,” Cabazon, 124 F.3d at 1065 (Wiggins, J.,
 6 dissenting), the Court **GRANTS** Respondent Pala Band’s motion to dismiss for lack of
 7 subject matter jurisdiction and **DISMISSES WITHOUT PREJUDICE** Petitioner
 8 Unite Here’s Petition.⁸ (Doc. Nos. 4, 5.)

9

10 B. Even If the Court Had Subject Matter Jurisdiction, Plaintiff Has Not
 11 Exhausted Tribal Remedies or Shown That There is No Tribal Court

12 Respondent Pala Band argues that even if federal subject matter jurisdiction is
 13 somehow proper, and Unite Here enjoyed a private right of action to enforce the
 14 Gaming Compact, federal jurisdiction is still improper because Unite Here did not first
 15 exhaust Tribal Court remedies. (Resp.’s Mot. 13.) Respondent alleges that it contacted
 16 the Intertribal Court of Southern California (“ICSC”) and confirmed that the tribunal
 17 is functioning and would entertain jurisdiction over this action. (*Id.* 3–5.) Finally,
 18 Respondent alleges that it informed Unite Here about the existence and jurisdiction of
 19 the ICSC and provided the labor union with documentation about practicing before the
 20 tribunal. (*Id.*)

21

22 ⁷Although Unite Here correctly argues that Indian gaming is subject to extensive federal
 23 regulation, there is no evidence that Congress was especially concerned about regulating the
 24 rights of Casino workers and the freedom to unionize on tribal lands. Rather, the contested
 25 labor rights and arbitration processes are enshrined in the TLRO, which was a condition on
 26 the state of California’s agreement to the Gaming Compact. Thus, the federal interest at stake
 in this lawsuit is minimal. See Merrell-Dow Pharmaceuticals Inc. v. Thompson, 478 U.S. 804,
 814 n.12 (1986) (recognizing some truth to observation that § 1331 decisions can best be
 understood as an evaluation of the nature of the federal interest at stake), cited by Cabazon,
 124 F.3d at 1056.

27

28 ⁸Because the Court finds that it does not have subject matter jurisdiction over this type
 of dispute, it does not reach the question of whether Unite Here enjoys a private right of action
 to enforce the Gaming Compact or whether the Pala Band has waived its sovereign immunity.

1 Petitioner Unite Here contends, in response, that Unite Here's counsel made a
 2 single phone call to the ICSC and was given conflicting information regarding the
 3 practice, procedure, and jurisdiction of the court. (Pet.'s Opp'n 15–17.) Based on this
 4 call, Petitioner argues that the ICSC is "non-functioning," obviating the requirement
 5 to exhaust tribal remedies.

6 When federal and tribal courts have concurrent jurisdiction over a claim,
 7 "considerations of comity direct that tribal remedies be exhausted before the question
 8 is addressed by the District Court." Johnson v. Gila River Indian Community, 174 F.3d
 9 1032, 1035 (9th Cir. 1999). However, exhaustion is not required where it would be
 10 futile to file a claim because the tribal court is not functioning. Id. at 1035–36. In
 11 Johnson, the court found that a tribal appellate court was non-functioning where a
 12 plaintiff had corresponded with an appellate tribunal for four months and not received
 13 any meaningful reply or briefing schedule. See id. ("[T]he lack of a briefing schedule,
 14 scheduled appellate argument, a meaningful response to the notice of appeal, or any
 15 answer to any of [plaintiff's] correspondence for an abnormally extensive period of time
 16 create doubt that a functioning appellate court exists.").

17 In this case, it is unclear whether the ICSC is a functioning tribal court, ready to
 18 entertain Unite Here's petition to confirm an arbitration award against the Pala Band.
 19 But what is certain is that the Pala Band has produced information regarding the
 20 policies and procedures of the ICSC, has produced the ICSC's code of civil procedure
 21 and rules of court, and has produced documentation suggesting that the Pala Band has
 22 approved and currently considers itself a member ICSC tribe. (*Notice of Lodgement of*
 23 *Exhibits*, Exs. 2–6.) Additionally, Pala Band's counsel declares that he spoke with an
 24 ICSC Court Administrator, Temet Aguilar, who confirmed that the ICSC could and
 25 would hear this case. Finally, Pala Band has shared all this information with opposing
 26 counsel. (*Id.*, Exs. 8–14.)

27 Unite Here responds with an allegation that Unite Here's counsel made one
 28 phone call, to an unidentified person, who essentially told her that the ICSC could not

1 do all the things that Pala Band insists the ICSC can do. (*Martin Decl.* ¶¶ 3–6.) Based
2 on that single call, and despite Pala Band sharing copies of all relevant documents,
3 Unite Here concludes that it can proceed directly to federal court because the ICSC is
4 non-functioning.

5 Given Unite Here's competent (if ultimately unsuccessful) argument for federal
6 subject matter jurisdiction, it is surprising that Unite Here's efforts to invoke the TLRO
7 tribal remedy would be derailed by a single phone call. Although the information before
8 the Court does not allow a determination of whether the ICSC is functioning or not,
9 it is clear that Unite Here must take further action in order to even make their
10 argument. Unlike Johnson, Unite Here has not attempted correspondence with the
11 ICSC (besides the initial call) and has not attempted to file a case or otherwise invoke
12 the ICSC's jurisdiction. As ICSC information and addresses are readily available on the
13 Internet and through opposing counsel, the Court finds that Unite Here must do
14 something more than making one phone call to credibly argue that they can proceed
15 straight to federal court because the ICSC is non-functioning. Because in any event the
16 Court determines that it lacks subject matter jurisdiction over the matter, the Court
17 denies Unite Here's request for a Rule 56(f) continuance and **GRANTS** Respondent
18 Pala Band's motion to dismiss for failure to exhaust tribal remedies and **DISMISSES**
19 **WITHOUT PREJUDICE** Petitioner Unite Here's petition to confirm an arbitration
20 award. (Doc. Nos. 4, 5.)

21

22 **IV. CONCLUSION**

23 For the above reasons, the Court finds that it does not have federal subject
24 matter jurisdiction over a labor union's petition to confirm an arbitration award entered
25 pursuant to a labor ordinance enacted by an Indian tribe, where the labor ordinance
26 was enacted under a gaming compact between the State of California and the tribe.
27 Even if the Court did have federal subject matter jurisdiction, the labor union has not
28 demonstrated that it exhausted tribal remedies before filing suit in this federal forum.

1 Accordingly, the Court **GRANTS** Respondent's motion and **DISMISSES WITHOUT**
2 **PREJUDICE** Petitioner's petition to confirm an arbitration award.

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4 **IT IS SO ORDERED.**

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6 Dated: May 22, 2008

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Hon. THOMAS J. WHELAN
United States District Court
Southern District of California